LETTER OPINION
2004-L-62

October 5, 2004

The Honorable Francis J. Wald
State Representative
PO Box 926
Dickinson, ND 58602-0926

Dear Representative Wald:

Thank you for your letter asking several questions about the authority of a home rule city to provide for the appointment of a municipal judge and clerk of court. Based upon the following, it is my opinion that a home rule city may provide for the appointment of a municipal judge and set the term of office through city ordinance. Similarly, it may appoint a clerk of court without the consent of the municipal judge. Further, it is my opinion that it does not violate the separation of powers doctrine for a home rule city to adopt an ordinance providing for the appointment of a municipal judge.

ANALYSIS

You first asked about the authority of a home rule city to appoint a municipal judge, to set the term of office at two years, and to appoint a clerk of court without the consent of the municipal judge, all in apparent conflict with several state statutes. Section 40-14-01, N.D.C.C., states that each "city operating under the council form of government may choose to have a municipal judge who is elected." Further, N.D.C.C. § 40-14-02 provides that elected officials hold their respective office for a four-year term. Finally, N.D.C.C. § 40-18-06.1 states, in part, that a court clerk may be appointed by the city governing body with the consent of the municipal judge. While these sections apply to cities generally, they may not apply to a city that has adopted a home rule charter under N.D.C.C. ch. 40-05.1. Your letter involves the City of Wahpeton, which has adopted a home rule charter.

North Dakota cities, including home rule cities, are creatures of the Legislature and only have those powers expressly granted to them or necessarily implied from the grant by the Legislature. See N.D. Const. art. VII, § 6; Litten v. City of Fargo, 294 N.W.2d 628, 631-632 (N.D. 1980). The Legislature expressly granted cities the authority to "frame, adopt, amend, or repeal home rule charters." N.D.C.C. § 40-05.1-01. In addition, the

Legislature stated that a home rule charter may provide for a city court and city officers[1], and it may set "their selection, terms, powers, duties, qualifications, and compensation." (Emphasis added.) See N.D.C.C. § 40-05.1-06(4) and (5).

A home rule charter and the ordinances made under it supersede state laws to the contrary within the city's jurisdiction and are to be liberally construed for such purposes. N.D.C.C. § 40-05.1-05. The power must be contained in the city's home rule charter and implemented by ordinance in order to supersede state law. Litten v. City of Fargo, 294 N.W.2d 628 at 632 (N.D. 1980). N.D.A.G. 96-F-08. See also N.D.C.C. § 40-05.1-06.

The City of Wahpeton adopted a home rule charter on November 8, 1988. In its charter, it set out terms virtually identical to those in N.D.C.C. § 40-05.1-06(4) and (5). Specifically, the charter stated that the city may provide for a city court and city officers, and it may set "their qualifications, selection, terms, powers, duties, and compensation." (Emphasis added.) See Wahpeton, N.D., Home Rule Charter Art. 3, § 2(f) (1988). In addition, the City of Wahpeton enacted Ordinance No. 720 which provided for the appointment and term of a municipal judge; however, nothing in this specific ordinance references the office of the court clerk. See Wahpeton, N.D., Ordinance No. 720 (Jan. 17, 1995).

It is my opinion that since the City of Wahpeton was empowered to enact Ordinance No. 720 by the Legislature and its own home rule charter, the ordinance supersedes N.D.C.C. §§ 40-14-01 and 40-14-02 relating to the selection and term of municipal judges. The City of Wahpeton may provide that the court clerk does not have to be approved by the municipal judge;[2] however, this must be implemented through a city ordinance. Absent a city ordinance, N.D.C.C. § 40-18-06.1 would apply.

Because it is my opinion that the City's enactment of Ordinance No. 720 was a valid exercise of home rule authority, any discussion regarding your question about remedies relating to the appointment of the municipal judge is unnecessary.

Your final question asks about the constitutionality of a home rule city adopting an ordinance providing for the appointment of a municipal judge. Specifically, you question whether this ordinance violates the separation of powers doctrine. Under the separation of powers doctrine, the legislative, executive, and judicial branches of government are separate and distinct to prevent abuse of power. The first article of the United States Constitution states "[a]ll legislative powers . . . shall be vested in a Congress." See U.S.

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[1] "'City officers' means the elected and appointed officers of the city and includes the governing body of the city and its members." N.D.C.C. § 40-05.1-00.1(1).

[2] Note that the supervisory authority over the performance of judicial functions by the clerk belongs exclusively to the judiciary. See N.D.A.G. 96-20

Const. art. 1, § 1 . The second article vests "the executive power . . . in a president." See U.S. Const. art. 2, § 1. The third article places the "judicial power of the United States . . . in one Supreme Court" and "in such inferior Courts as the Congress may . . . establish." See U.S. Const. art. 3, § 1. Similarly, the North Dakota Constitution establishes three separate branches of state government: the legislative, the executive, and the judiciary. N.D. Const. art. IV, art. V, art VI. See also, Shaw v. Burleigh County, 286 N.W.2d 792, 795 (N.D. 1979); City of Carrington v. Foster County, 166 N.W.2d 377, 382 (N.D. 1969); State v. Kromarek, 52 N.W.2d 713, 714-15, cert. denied, 343 U.S. 968 (1952).

While power is distributed among three branches of government in North Dakota, the North Dakota Supreme Court has stated that the North Dakota Constitution "is not to be construed as rigidly classifying all the functions of government as being either legislative, executive or judicial." State ex rel. Mason v. Baker, 288 N.W. 202, 205 (N.D. 1939). In Minneapolis, St. P. & S.S.M.R. Co. v. State Board of Ry. Com'rs, 152 N.W. 513, 515 (N.D. 1915), the court stated:

> There is nothing in the federal Constitution to hinder a state from uniting "legislative and judicial powers in a single hand" (Prentiss v. Atl. Coast Line, 211 U. S. 210-225, 29 Sup. Ct. 67, 53 L. Ed. 150; Dreyer v. Illinois, 187 U. S. 71-84, 23 Sup. Ct. 28, 47 L. Ed. 79; Winchester & Strasburg R. R. Co. v. Commonwealth, 106 Va. 264- 268, 55 S. E. 692; 6 R. C. L. 147); and, though in our state Constitution the three departments of government, executive, legislative, and judicial, are primarily separately invested with powers to be so classified respectively, "it is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link or dependence the one upon the other in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments." Story's Const. (5th Ed.) 393. "Again, indeed, there is not a single Constitution of any state in the Union which does not practically embrace some acknowledgment of the maxim [separation of the powers of government to be administered by the three arms of government separately], and at the same time some admixture of powers constituting an exception to it. Story's Const. (5th Ed.) 395." Winchester Ry. Co. v. Commonwealth, 106 Va. 264-270, 55 S. E. 692.

Generally, it is not a violation of the separation of powers doctrine to provide for municipal judges to be appointed. "States may determine whether its judges are elected or appointed, and nothing in the federal Constitution prohibits that right." Marshall v. Price, 6 Fed.Appx. 788, 2001 WL 314398 (C.A. 10 (Colo.) 2001) (citing Chisom v. Roemer, 501 U.S. 380, 400 (1977)). See also, Aguilar v. City Comm'n of City

of Hobbs, 940 P.2d 181, 185 (N.M. App. 1997) (city commission's ordinance regarding appointment of temporary municipal judges does not violate the separation of powers); Jett v. City of Tucson, 882 P.2d 426, 434 (Ariz. 1994) (the appointment of magistrates for a term long enough to insulate them from pressure does not violate the separation of powers doctrine); Winter v. Coor, 695 P.2d 1094, 1102 (Ariz. 1985) (there is nothing unconstitutional about the appointment of magistrates).

While the appointment of judges does not violate the separation of powers doctrine, some courts have found that it may be a violation if the ordinance or statute allows one branch to interfere with or control another. For example, the court in Winter v. Coor, 695 P. 2d 1094 (Ariz. 1985), found an ordinance providing that a magistrate serve at the pleasure of the council to be unconstitutional. The court explained that "[e]ach magistrate's tenure here is directly subject to the pleasure of the elected town council, which has executive and legislative rather than judicial powers and has the ability to impose political pressures on the magistrate." Id. at 1101. The court reasoned that since magistrates have jurisdiction over state law violations, they must have judicial independence and may not be removed at will by a town's executive or legislative officers. Id. See also Jett v. City of Tucson, 882 P.2d 426, 433 (Ariz. 1994) (holding that judicial independence requires that magistrates be insulated from arbitrary removal without cause). But see Ward v. City of Cairo, 583 S.E. 2d 821 (Ga. 2003) (statute providing that municipal court judges serve at the pleasure of the governing authority did not violate the separation of powers); People, by and on Behalf of People of City of Thornton v. Horan, 556 P.2d 1217, 1218-1219 (Colo. 1976) (home rule city charter establishing municipal courts with its judges appointed by city council and serving at council's pleasure was not in violation of state constitutional and statutory provisions).

In addition, the ordinance establishing the appointment procedure was based on authority given to home rule cities by a statute that allows home rule cities to determine how municipal judges are selected. See N.D.C.C. § 40-05.1-06. "In North Dakota, statutes are presumed to be constitutional unless they clearly contravene a constitutional provision. Verry v. Trenbeath, 148 N.W. 2d 567, 571 (N.D. 1967). The legislature has declared that a statute's intent is presumed to be in '[c]ompliance with the constitutions of the state and United States.' N.D.C.C. § 1-02-38(1). The North Dakota Supreme Court resolves constitutional doubts in 'favor of validity of the statute.' Snortland v. Crawford, 306 N.W.2d 614, 626 (N.D. 1981). Furthermore, North Dakota's Constitution requires four of the five Supreme Court justices to agree before the court may declare a statute unconstitutional. N.D. Const. art VI, § 4. Thus, to have a statute declared unconstitutional by the North Dakota Supreme Court, a challenger must remove all doubt to the statute's validity, must demonstrate the statute clearly contravenes a constitutional provision, and must convince at least four of the Supreme Court justices these standards have been met." N.D.A.G. Letter to Nicholas (Nov. 15, 1989).

Given the presumption of constitutionality upon which the statutory authority to adopt the ordinance was based, and the fact that several courts have held that appointing judges is not a violation of the separation of powers doctrine, it is my opinion that it does not violate the separation of powers doctrine for a home rule city to adopt an ordinance providing for the appointment of a municipal judge.

Sincerely,

Wayne Stenehjem
Attorney General

njl/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).